In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 605

RAYMOND H. PETERSON, PETITIONER

v.

EUGENE M. ZUCKERT, SECRETARY OF THE AIR FORCE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The order of the district court (R. 90)[1] is unreported. The opinion of the court of appeals (Pet. App. pp. 1–2) is reported at 321 F. 2d 748.

JURISDICTION

The judgment of the court of appeals was entered on June 13, 1963. On September 6, 1963, the Chief Justice extended the time to file a petition for a writ of certiorari to and including November 4, 1963. The petition was filed on November 4, 1963. The

[1] "R" refers to the Joint Appendix which was filed in the court of appeals. A copy of the Joint Appendix is now on file in this Court.

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jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner's suit for restoration to his former Civil Service position, instituted more than four years after his demotion, was barred by laches.

STATEMENT

In April 1957, petitioner, a non-veteran civilian employee of the Chicago Air Procurement District of the Air Force, held the position of production specialist, GS–9 (R. 48). After several official reprimands for failure to comply with required reporting procedures in regard to delinquent contracts, the personnel division, on August 9, 1957, sent petitioner a notice of final decision to remove him as of August 27, 1957 (R. 66–70). Petitioner was advised of his right to appeal the decision through the Air Force Grievance Procedure (R. 69).

Petitioner made use of the Air Force Grievance Procedure[2] by timely request for an informal review by the Commander, alleging that the penalty of removal was too severe for his infractions (R. 71). Upon review, it was concluded that the petitioner was not qualified to carry out the responsibility of his position and that removal was justified in view of the seriousness of the offense (R. 73–80). The Hearing Officer recommended that the removal action be

[2] While advised of the Air Force Grievance Procedure, through inadvertence, petitioner was not informed that (at the time he received the notice of removal) employees in his situation also had a limited right of appeal to the Civil Service Commission.

left undisturbed, that petitioner's appeal for reduction of the penalty be denied, but that petitioner be offered a lower position because of mitigating factors including his advanced age (61 years in 1957) and the prior lax supervision of petitioner.

On September 5, 1957 the Commander concurred in the Hearing Officer's recommendations (R. 86). Accordingly, petitioner was notified on September 5, 1957 that the removal decision had been upheld but that petitioner might remain with the Procurement District as a Property Clerk, GS-4, if he wished to accept the lower grade in lieu of removal (R. 82). Petitioner was notified of his right to seek review of the decision by the Major Air Command and to obtain help in preparing an appeal (R. 82-83). No appeal was prosecuted (R. 43-44). On September 6, 1957 petitioner accepted the lower grade (R. 56).

In the four years subsequent to petitioner's demotion, no legal action was taken. The present action was first instituted against the respondent Secretary of the Air Force on September 15, 1961. Petitioner sought a declaratory judgment restoring him to his GS-9 position and payment of $9,776.00, the difference between the GS-9 and GS-4 salaries for the intervening four years (R. 10-11). The complaint mainly attacked the substantive grounds for the removal and subsequent change to lower grade. The removal was alleged to have been part of a plan to rid the Service of older men (R. 5-10). It was further alleged that petitioner had been

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[1] The salary claim was subsequently withdrawn.

coerced into accepting demotion by the threat of removal (R. 10).

In his answer, respondent denied the allegations of coercion and illegality (R. 13–14), and contended that the suit was barred by laches and failure to exhaust administrative remedies (R. 12). Respondent's motion for summary judgment was denied without opinion on August 13, 1962 (R. 37).

On August 9, 1962, petitioner moved for summary judgment on several procedural issues, contending that the action was not barred for failure to exhaust administrative remedies because he had not been notified of his right to seek review by the Civil Service Commission (R. 38), that the action was not barred by laches (R. 20–22), that the removal action was illegal because of various defects in the advance notice of proposed removal (R. 37–38) and the letter of decision (R. 38) and because the Performance Rating Act had not been complied with (R. 38). On October 15, 1962 the district court, without opinion, granted petitioner's motion.

Upon appeal to the United States Court of Appeals for the District of Columbia, the decision of the district court was reversed on the ground that petitioner's claim was barred by laches. The case was remanded and subsequently dismissed.

ARGUMENT

The decision below, holding petitioner's claim barred because of his four year delay in filing suit, is plainly correct. It follows principles established by this Court in *Arant* v. *Lane*, 249 U.S. 367, and

consistently applied since then. There is no occasion for further review of the application of these principles in the present case.

As already noted, the administrative action demoting petitioner in lieu of removal became effective on September 6, 1957. Yet no further proceedings were taken until the present action was commenced more than four years later, *i.e.*, September 15, 1961. This delay has clearly prejudiced the government. Petitioner's position has been filled (R. 43). Reinstatement of petitioner would not only obligate the government to pay double salaries for a future period, but would also render the government liable for back pay for four years because of petitioner's inaction. Regard for the public purse requires a civil service employee to pursue his claim diligently, or his remedy will be lost even where serious procedural and substantive irregularities are alleged. *Arant* v. *Lane*, 249 U.S. 367 (20 months' delay); *Drown* v. *Higley*, 244 F. 2d 774 (C.A.D.C.) (two years' delay).

As the cases indicate, much shorter intervals than the four year period in this case have consistently been held to bar belated decisions to litigate. *Chappelle* v. *Sharp*, 301 F. 2d 506 (C.A.D.C.), certiorari denied, 370 U.S. 903 (34½ months' delay); *Jones* v. *Summerfield*, 265 F. 2d 124 (C.A.D.C.), certiorari denied, 361 U.S. 841 (33 months' delay); *O'Connor* v. *Summerfield*, 239 F. 2d 69 (C.A.D.C.) (one and a half years' delay); *Haas* v. *Overholser*, 223 F. 2d 314 (C.A.D.C.), (two years' delay);

Grasse v. *Snyder*, 192 F. 2d 35 (C.A.D.C.), (sixteen months' delay); *Caswell* v. *Morgenthau*, 98 F. 2d 296 (C.A.D.C.), certiorari denied, 305 U.S. 596 (one and a half years' delay).

The explanation offered by petitioner for his delay—that it took him four years to "find the appropriate remedy" (R. 20)—is not an adequate answer. In *Jones* v. *Summerfield*, *supra*, the employee consumed approximately a year in writing to various officials seeking reinstatement, as petitioner did in the instant case. But, there, as here, such activity was held insufficient to excuse the delay in filing suit. Moreover, according to petitioner's own affidavit, he was aware by May 26, 1959, that his proper remedy was a lawsuit (R. 34). Yet he delayed an additional month before consulting a lawyer (R. 34). Petitioner was informed in early 1960 that his case would require action by a lawyer in Washington (R. 35). Refusing to proceed on the basis of that information, petitioner allegedly spent the next several months in correspondence with Admiral Radford, who also advised petitioner, on October 5, 1960, that he should obtain counsel (R. 35). Again, a month elapsed before petitioner communicated with a lawyer (R. 35) who eventually referred him to present counsel. In the circumstances, it seems plain the court below properly held the present claim barred by laches.

CONCLUSIONS

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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